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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|--|-------------|----------------------|---------------------|------------------|
| 10/659,861 | 09/11/2003 | Jim Azzar | HOL01 P-102 | 5077 |
| 28101 | 7590 | 10/19/2005 | EXAMINER | |
| VAN DYKE, GARDNER, LINN AND BURKHART, LLP 2851 CHARLEVOIX DRIVE, S.E. P.O. BOX 888695 GRAND RAPIDS, MI 49588-8695 | | | LHYMN, EUGENE | |
| | | ART UNIT | PAPER NUMBER | |
| | | 3727 | | |
| DATE MAILED: 10/19/2005 | | | | |

Please find below and/or attached an Office communication concerning this application or proceeding.

| | | |
|------------------------------|------------------------|---------------------|
| Office Action Summary | Application No. | Applicant(s) |
| | 10/659,861 | AZZAR, JIM |
| | Examiner | Art Unit |
| | Eugene Lhymn | 3727 |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on _____.
- 2a) This action is FINAL. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-24 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-24 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 11 September 2003 is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____ | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claim 24 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Specifically, it unclear which base wall the claim refers to.

Appropriate correction is required.

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-7, 10-16, and 18-23 are rejected under 35 U.S.C. 102(b) as being anticipated by Colombo (US 5266763). With respect to claim 1, Colombo discloses the following;

- A tray having a base wall and sidewalls extending up from the base wall to form a cavity (Fig. 3, item 20)
- A flexible liner configured and arranged to substantially conform to the inner surfaces of the base wall (Fig. 3, item 40). Moreover, regarding the limitation "preformed," it has been held that method limitations in a product claim do not

serve to patentably distinguish the claimed product from the prior art. See *In re Thorpe*, 777 F.2d 695, 227 USPQ 964 (Fed. Cir. 1985). Thus, even though a product-by-process claim is limited and defined by a process, determination of patentability is based on the product itself. Accordingly, if the product in a product-by-process claim is the same or obvious from a product of the prior art, the claim is unpatentable even though the prior art product was made by a different process. *Thorpe*, 777 F.2d at 697, 227 USPQ at 966; *In re Marosi*, 710 F.2d 799, 218 USPQ 289 (Fed. Cir. 1983). The foregoing argument is pertinent to all subsequent claims containing the limitation "performed."

With respect to claims 2 & 12, Colombo discloses the sidewalls of the tray forming a contiguous perimeter wall (Fig. 3, item 20).

With respect to claims 3, 14, and 23, Colombo discloses the liner comprising flexible paper liner (Col. 4, Lines 34-40).

With respect to claim 4, Colombo discloses the liner comprising flexible paper board liner (Col. 4, Lines 34-40).

With respect to claim 5, Colombo discloses the tray comprising a plastic tray (Col. 4, Lines 34-40).

With respect to claims 6, 7, 15, 16, and 20, Colombo discloses the base wall comprising a rectangular base wall (Fig. 3, item 20).

With respect to claim 11, Colombo discloses the following:

Art Unit: 3727

- A tray having a base wall and sidewalls extending up from the base wall to form a cavity (Fig. 3, item 20)
- A flexible liner having a base wall and upstanding sidewalls, the base wall of the liner substantially conforming to the base wall of the tray and the sidewalls of the liner substantially conforming to the sidewalls of the tray (Fig. 3)

With respect to claims 13 & 19, Colombo discloses the liner comprising a flexible liner (Col. 4, Lines 34-40).

With respect to claims 18 & 22, Colombo discloses the following:

- A tray having a base wall and a perimeter wall extending around and up from the base wall (Fig. 3, item 20)
- A flexible liner having a base wall and upstanding perimeter wall (Fig. 3, item 40)

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 8-10, 17, 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Colombo in view of Ross Jr. (US 6639199 B1). With respect to the claims, Colombo discloses the claimed invention except for the liner including indicia. However, Ross Jr. teaches a food container including indicia (Col. 4, Lines 4-10) so as to provide

an emblem or symbol for aesthetic value. It should be noted that whether the indicia is formed or printed is irrelevant since it has been held that method limitations in a product claim do not serve to patentably distinguish the claimed product from the prior art. See *In re Thorpe*, 777 F.2d 695, 227 USPQ 964 (Fed. Cir. 1985). Thus, even though a product-by-process claim is limited and defined by a process, determination of patentability is based on the product itself. Accordingly, if the product in a product-by-process claim is the same or obvious from a product of the prior art, the claim is unpatentable even though the prior art product was made by a different process. *Thorpe*, 777 F.2d at 697, 227 USPQ at 966; *In re Marosi*, 710 F.2d 799, 218 USPQ 289 (Fed. Cir. 1983). Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to include indicia on the liner of Colombo as taught by Ross Jr. so as to provide aesthetic value.

5. Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over Colombo in view of Greiner (US 6253918 B1). With respect to the claim, to the degree that the claim is understood, Colombo discloses the claimed invention except for the base wall of the tray being circular. However, Greiner teaches a container system wherein the base wall of the tray, Fig. 2, item 14, is circular. Having a circular base wall is a matter of obvious design choice wherein it has been held that a change in form or shape is generally recognized as being within the level of ordinary skill in the art, absent any showing of unexpected results. *In re Dailey et al.*, 149 USPQ 47. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to

configure the base wall of Colombo to be circular as taught by Greiner so as to vary the design shape.

Conclusion

6. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Walker (US 5782374)

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Eugene Lhymn whose telephone number is 571-272-8712. The examiner can normally be reached on MTWT 6-4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Nathan Newhouse can be reached on (571)272-4544. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



NATHAN J. NEWHOUSE
SUPERVISORY PATENT EXAMINER